Circuit Court of the United States, District of Virginia.

MATTER OF CHARLES H. WYNNE, BANKRUPT.

Debts secured by a deed of trust, made without fraud and without violation of any provision of the Bankrupt Act, are to be preferred in payment to the claims of general creditors in the distribution of the proceeds of the bankrupt estate by the assignee in bankruptcy.

Semble, that, though under the statute of the state, a deed of trust takes effect as to creditors only from and after the recording thereof, such a deed will take effect from that time, though such recording be after the passage of the Bankrupt Act, if it be before the filing of the petition in bankruptcy.

It appears, from the Journal of the Senate of the United States, that the Bankrupt Act of March 2, 1867, was not in fact approved till Monday, the 4th of March; and this fact may be shown to support a deed recorded in the afternoon of the 2d of March, 1867; the validity of which is questioned upon the ground that it was not recorded until after the approval of the act.

The landlord in Virginia has a lien on property of the tenant, being and remaining upon the demised premises, for one year's rent accrued and to accrue, in preference to any mortgage, deed of trust, or judgment; and this lien is to be satisfied by the assignee in preference to such other liens, as well as in preference to the claims of general creditors.

The question in this case arose upon a petition of John Johns, Jr., assignee of Charles H. Wynne, an involuntary bankrupt, asking for instructions as to the order of payment of claims against the bankrupt estate. Wynne was adjudicated a bankrupt on the petition of Wheelwright, Mudge & Co., filed in the District Court of the United States for the District of Virginia on the 8th of June, 1867.

Enders, Paine, and Williams, claimed to be preferred in payment under a deed of trust dated August, 1866, which was never recorded; or, if that claim be disallowed, then under a deed of trust dated December 8, 1866, recorded March 2, 1867.

Haxall & Co. also insisted on preference upon the ground that Wynne was tenant under them of the warehouse which he occupied, and that under the law of Virginia they as landlords had a lien for the rent due at the date of the petition; to enforce which, on the 10th of June, 1867, they sued out a distress warrant for $2,120, the amount of rent then due, and caused the same to be levied on the goods then on the premises; and subsequently, on the 18th of July, 1867, sued out an attachment, which was levied the same day upon the same goods for

$1,500, the amount of rent to become due on the 1st of December, 1867.

Opinion by

CHASE, C. J.—We will consider first the claim to preference in payment advanced in behalf of Enders, Paine, and Williams.

And we must say at once that so far as this claim is founded on the deed of August, 1866, it cannot be admitted. It is doubtless true that a mortgage or other conveyance made as security for a debt evidenced by a note or bond will operate as security for the same continuing debt, though the evidence of it be changed by renewal or otherwise: *Farmers' Bank* v. *Mutual Ins. Society*, 4 Leigh, 69. But in this case it is the security itself which has been changed, and not the evidence of the debt. The deed of December 8, 1866, was executed, as it seems, in substitution for that of August, which thereupon ceased to have any validity or effect.

The only question now to be determined is, therefore, whether or not the deed of December created a lien upon the property described in it, which the assignee of the bankrupt must satisfy before applying any of its proceeds to the claims of the general creditors. And it is to be observed that the deed is not condemned by the 35th section of the Bankrupt Act, which avoids all assignments and other modes of preference made or attempted by insolvents, or persons in contemplation of insolvency, within four months before the filing of the petition in bankruptcy, or in case the person to be benefited has notice of the intent within six months before such filing. The deed in question was not made within either limit of time. It need not, therefore, be here considered whether either period could begin to run till after the passage of the act. If the deed is to be treated as void or inoperative as against the assignee by operation of the act, it must be because of the effect of that clause of the 14th section which provides "that all the property conveyed by the bankrupt in fraud of his creditors" "shall in virtue of the adjudication of bankruptcy and the appointment of the assignee be at once vested in such assignee."

We do not doubt that the assignee takes the property in the same plight in which it was held by the bankrupt when his

petition was filed—*Winsor* v. *McLellan*, 2 Sto. 495—subject to such liens or incumbrances as would affect it if no adjudication in bankruptcy had taken place; but it is to be remembered that the assignee represents the rights of creditors as well as the right of the bankrupt; and that any lien or incumbrance which would be void for fraud as against creditors if no petition had been filed or assignee appointed, will be equally void as against the general creditors represented by the assignee: *Bradshaw, assignee*, v. *Klein*, 7 Am. Law Reg., N. S. 505; *Carr* v. *Hilton*, 1 Cur., 230.

This is what the act means when it vests in the assignee "all property conveyed in fraud of creditors." It does not make any conveyance or incumbrance fraudulent. It simply clothes the assignee with the entire title, notwithstanding such conveyance or incumbrance, and makes it his duty to invoke the proper jurisdiction to annul the fraudulent proceedings.

And it may be remarked further that except to this extent the Bankrupt Act has no influence upon this case, so far as the deed of trust is concerned.

Much was said in argument concerning the effect of the record of this deed upon the 2d of March, 1867; and it was strenuously urged that the deed was avoided by the effect of the act which purports to have been approved on that day. But we entirely concur with Mr. Justice STORY in thinking that where the question is as to the effect of a proceeding instituted on the same day on which an act affecting the validity of such proceeding was passed the precise time at which the act became a law, may be properly inquired into: *Matter of Richardson*, 2 Sto., 521. And in this we think ourselves warranted also by the reasoning of the Supreme Court: *Gardner* v. *Collector*, 6 Wall., 511.

Now, it is in proof that the deed of trust was recorded about 4 P. M. on the 2d day of March, 1867; and it appears from the Senate journal of the session during which the act was passed that the day denominated the 2d day of March in the journal, and in the approval of the statute by the President, consisted in fact of Saturday the second of March, of Sunday the third, and of Monday the fourth until noon; and it appears

further, that the bill which afterwards became the bankrupt law was not enrolled and delivered to the proper committee, to be presented to the President for his signature, until after the recess, which ended at 7.30 P. M. on Sunday, and was not reported to the Senate as actually signed by the President until after 9.40 A. M. on Monday: Senate Journal, 2 Sess. 39th Cong., 1866-7, pp. 432-458.

It cannot be doubted, then, that the deed of trust was, in fact, recorded nearly two days before the bankrupt bill became a law; and we think ourselves not only warranted on general principles, but bound by the Constitution to notice the fact thus appearing upon the public records.

It may well be questioned, indeed, whether, if the act had been approved before the recording of the deed, the effect of the latter would have been altered. Nothing in the thirty-fifth section touches the deed; and nothing in any other, except the fourteenth. It may be, and we think it is, true that if the deed had remained unrecorded when the petition in bankruptcy was filed, the title of the assignee would have prevailed against any claim under the deed, for the assignee represents the creditors, and the statute of Virginia—Rev. Code, 1860, p. 566, § 5; see *Winsor* v. *Kendall*, 3 Sto., 515—expressly declares "any deed of trust void as to creditors," until and except from the time it is duly admitted to record. It is not an unreasonable construction of the Bankrupt Act, as we think, which regards it as vesting in the assignee for the benefit of creditors in general, the estate of the bankrupt discharged of liens or trusts, which, at the time of the petition, are invalid, *inter partes*, under the statute of the state in which they are claimed to exist. But we do not see how the mere enactment of the law could affect a deed previously executed.

It is not, however, necessary to consider these points here. The important question in the case is, whether under the fourteenth section of the bankrupt act this deed must be regarded as inoperative against the assignee? The counsel for the assignee has argued with much earnestness, that the deed cannot be sustained without disregarding the implied effect of the first clause of the second general proviso of that section: "That no

mortgage of any vessel, or of any other goods and chattels made as security for any debt or debts in good faith and for present consideration, and otherwise valid and duly recorded pursuant to any statute of the United States, or of any state, shall be invalidated or affected hereby."

The argument is, that all mortgages not expressly saved from the operation of the act by this clause must be held invalid; and, therefore, that all deeds of trust and other conveyances intended as security for debts, and not within the description of the mortgages expressly saved, must also be invalid.

But we cannot adopt this reasoning. It would be going too far, we think, to hold all mortgages not included by the terms of the description to be invalidated by the act. The clause expressly saves certain mortgages, but it says nothing as to others. Much less does it say anything as to deeds of trust, or conveyances of analogous character. It leaves all deeds and instruments of writing not expressly saved to the general principles of jurisprudence. To hold otherwise, would, we think, be to give to the act an *ex post facto* operation contrary to the intent of Congress.

And it would be quite gratuitous so to hold; for all just rights of creditors as against instruments not described in this clause, are fully protected by that which stands next in the section and vests in the assignee for their benefit all the property conveyed by the bankrupt in fraud of his creditors.

The next question in this case, therefore, is, whether the deed of trust by which the several liabilities of Enders, Paine, and Williams, for Wynne were secured, was made in fraud of the creditors of Wynne.

It has been argued that the deed of trust took effect as against creditors only on the 2d day of March, 1867, and that the recording of the deed on that day was itself an act of bankruptcy. To maintain this proposition, it is necessary to show that the recording of the deed was the act of Wynne. But clearly it was no act of his. The deed as against him was operative from its date. It was then that all his interest in the property described in it became vested by way of security in the trustee. It was then that he delivered the deed and parted

with all control of it. If the beneficiaries were satisfied with the security afforded by the deed unrecorded, there was neither necessity nor obligation to record it. To record it was only necessary to make it a valid security against other creditors; and it was not for Wynne, but for the creditors secured by the deed, to determine whether it should be recorded or not. The delivery of it for record was in no sense his act, but theirs. In no sense, therefore, can it be regarded as an act of bankruptcy.

But it has been argued that as against creditors it must be regarded as a deed executed at the date of the record, and therefore as a deed creating a preference on that day, which was within four months of the filing of the petition. There is ingenuity and apparent force in this argument. But we think there are decisive answers to it. In the first place, the preference which the law condemns is a preference made within the limited time by the bankrupt, not a priority lawfully gained by creditors; and we have just shown that the preference gained by the record was not a preference made by the bankrupt. And, in the second place, the law which makes deeds of trust void "until and except from" the time of record clearly makes them valid at and from that time. And it is as much the policy of the bankrupt act to uphold liens and trusts when valid as it is to set them aside when invalid.

It is hardly necessary to add that this must be especially true of a trust deed created and recorded before the approval of the Bankrupt Act.

Was there any actual fraud in giving or taking the security created by the deed of trust? There has been no attempt to maintain this.

It has been said that Enders, Paine, and Williams, on the 8th of December, 1866, knew that Wynne was insolvent, but it is not denied that they had a right to obtain, if they could, preference in payment under the laws of Virginia. They could obtain it by direct transfer of property, or by deed of trust, or by judgment and execution. Until after the passage of the Bankrupt Act nothing but fraud in obtaining the preference, could invalidate it in whatever mode obtained.

It is not necessary to insist on this in the case before us, for

we do not think that the evidence establishes as matter of fact, that at the date of the deed or at the date of the record, Enders, Paine, and Williams were aware of the actual insolvency of Wynne. They knew, indeed, that he was embarrassed in carrying on his printing and publishing business, but they seem to have fully believed that his property was more than sufficient to pay all his debts.

On the whole, we are of the opinion that the deed of trust must be supported as a valid deed, and that the creditors named in it are entitled to be paid out of the proceeds of the property embraced in it.

The remaining question to be considered is, whether at the time of the filing of the petition in bankruptcy, Haxall & Co. had any lien for rent upon the property of the bankrupt.

This is the same property which was conveyed by the deed of trust, and the solution of the question just stated may be affected in some measure by the conclusion to which we have come in respect to the validity of the lien created by that deed.

And in considering the question now to be disposed of, we may lay out of view the proceeding by distress warrant and also the proceeding by attachment. As we understand the Bankrupt Act, all the rights and all the duties of the bankrupt in respect to whatever property, not expressly excluded from the operation of the act, he may hold under whatever title, whether legal or equitable, and however incumbered, pass to and devolve upon the assignee at the date of the filing of the petition in bankruptcy. And all rights thus acquired are to be enforced by process, and all duties thus imposed are to be performed under the superintendence of the national courts. No lien can be acquired or enforced by any proceeding in a state court, commenced after petition is filed, though in cases where jurisdiction has been previously acquired by state courts of a suit brought in good faith to enforce a valid lien upon property, such jurisdiction will not be divested: *Peck* v. *Jenness*, 7 How., 612.

Whether, therefore, the distress warrant or the attachment be regarded as a proceeding for obtaining or enforcing a lien, each was equally unwarranted—*Buckey* v. *Shouffer*, 10 Md.

Rep., 149—and the restraining order as to both was properly issued: 1 Bank. Reg. Suppt., xi. If a lien for rent existed, it was a lien to be discharged by the assignee, and enforced in the United States Court of Bankruptcy. If it did not exist it could not be brought into existence by any proceeding whatever.

The real question is, Were the goods on the premises demised to the bankrupt subject to a lien for rent under the state law when the petition was filed, independently of any proceeding by distress or attachment?

Liens are of various descriptions, and may be enforced in different ways; but we think it sufficient to say here, what seems to us well warranted in principle and authority, that whenever the law gives the creditor a right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, it gives a lien on such property to secure the payment of this debt. And we think that a lien of this sort is given by the 12th section of title 41, chapter 138 of the revised Code of Virginia, adopted in 1860. It expressly prohibits any person having, by deed of trust, mortgage, or otherwise, a lien upon goods of a tenant on demised premises from removing such goods without paying to the landlord the rent due and securing the rent becoming due, not exceeding altogether one year's rent; and it further requires any officer who may take such goods under legal process to pay out of the proceeds the rent in arrear and deliver to the landlord sufficient purchasers' bonds for the payment of that becoming due. We cannot doubt that this statute creates a lien in favor of the landlord, and a lien of a high and peculiar character. We have no concern with the policy of this legislation; it is upon the statute book, and the lien it creates must be respected and enforced.

The validity of the deed of trust in this case seems to us clear, and it is not doubted by any one that in the absence of the special circumstance supposed to affect it with invalidity the lien of the creditors secured by it would be perfect. But these creditors, by no process whatever, could appropriate these goods to the satisfaction of their debts without paying or securing the year's rent; and so of process under execution. The officer of the law, at his peril, must pay the rent out of the proceeds.

Would it not be trifling with the plain sense of words to say that there is a lien under the trust deed and a lien under the execution, but the claim which by law is made superior to either as a charge upon the goods is no lien? We hold in this case that the creditors in the trust have a lien. How can we hold that the landlord, whose claim under the law is superior to theirs, has no lien?

It seems to us, therefore, that Haxall & Co. had a valid lien for the arrears of rent due and for so much rent to become due under the lease as will make the whole amount secured equal to a year's rent. And we think that this lien is given by the statute independently of proceedings by distress warrant or attachment, which we regard as remedies superseded by the effect and operation of the Bankrupt Act: *Burket* v. *Bonde*, 3 Dana, 209; *Henchett* v. *Kimpson*, 2 Wils., 140.

In this case we do not pass upon the claims of Haxall & Co. upon the assignee for rent beyond the year during which the lien for the rent is given. We are inclined to think that he was entitled to the occupancy during the unexpired term; and that for the rent becoming due during that period Haxall & Co. would be entitled to prove their claim against the bankrupt as general creditors.

The decree of the District Court will be reversed and a decree entered in conformity with the principles of this opinion.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF GEORGIA.[1]

SUPREME COURT OF ILLINOIS.[2]

SUPREME COURT OF MISSOURI.[3]

SUPREME COURT OF NEW YORK.[4]

SUPREME COURT OF VERMONT.[5]

ADMIRALTY.

Lien under State Laws—Jurisdiction of United States Courts.—Where executions were issued in favor of the officers and employees

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[1] From J. H. Thomas, Esq., to appear in 39 or 40 Ga. Rep.
[2] From Hon. N. L. Freeman, Reporter, to appear in 51 Ill. Rep.
[3] From T. A. Post, Esq., Reporter, to appear in 46 Mo. Rep.
[4] From Hon. O. L. Barbour, to appear in vol. 56 of his reports.
[5] From W. G. Veazey, Esq., Reporter, to appear in 42 Vt. Rep.